UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VW CREDIT, INC.

and Case 13-CA-158715

KELLEY HELLMAN, AN INDIVIDUAL

VOLKSWAGEN GROUP OF AMERICA, INC.

and Case 13-CA-166961

KELLEY HELLMAN, AN INDIVIDUAL

VOLKSWAGEN GROUP OF AMERICA, INC.'S AND VW CREDIT, INC.'S OPENING BRIEF

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INTRODUCTION

The National Labor Relations Act (the "Act") prohibits employers from maintaining work rules that a reasonable employee would read as restricting his right to file unfair labor practice charges with the National Labor Relations Board (the "Board"). However, in the event that a work rule does violate the Act, the employer can repudiate its violation. Among other things, a repudiation must be timely, specific, and inform employees that the employer will not interfere with their rights in the future.

This case involves a form Agreement to Arbitrate (the "Agreement") that Respondents Volkswagen Group of America, Inc. ("VWGoA") and VW Credit, Inc. ("VCI") (collectively, "Volkswagen") have entered into with their employees. The Agreement initially made no mention of the Act. The General Counsel contends that the Agreement nonetheless violates the Act because reasonable employees would read it as restricting their right to file Board charges.

Volkswagen has now amended the Agreement (the "Amended Agreement"). The amendment took the form of notices (the "Notices") informing employees that Volkswagen was adding one additional sentence to the Agreement: "[t]his Agreement does not restrict your rights to file charges with the NLRB." The General Counsel contends that the Amended Agreement continues to violate the Act because, despite this language, reasonable employees would still read it as restricting their right to file Board charges.

The General Counsel is wrong. *First*, the Agreement is not unlawful because its very first section unambiguously limits it to disputes that traditionally have been resolved via a lawsuit filed in court. Reasonable employees know that they can resolve disputes with their employer via three methods: following the employer's internal procedures, seeking help from the government, and filing a lawsuit. They would understand that the Agreement covers only the

lawsuit method, leaving them free to seek help from the government (*i.e.*, file Board charges) without resorting to arbitration.

Second, the Notices repudiated any alleged unlawfulness in the Agreement. The Notices meet the requirements for an effective repudiation: they were issued shortly after Volkswagen became aware that the Regional Office considered the Agreement to be unlawful; they explained in specific detail that the Agreement was being amended to make it even clearer that employees may file Board charges; and they reassured employees that Volkswagen would stick with the new contractual language going forward.

Third, in any event, the Amended Agreement *certainly* does not violate the Act. That is because the Amended Agreement contains express language informing employees that it does not restrict their right to file Board charges. In fact, the Amended Agreement's language mirrors the very language that the Board uses in its remedial orders and notices when it finds an arbitration agreement to be unlawful. The lawfulness of the Amended Agreement is a straightforward matter, and finding the Amended Agreement to be lawful would be fully consistent with Board precedent. However, to the extent that the Board disagrees, for the reasons set forth below, Volkswagen respectfully urges the Board to abandon any precedents that would require it to find that the Amended Agreement violates the Act.

STATEMENT OF FACTS

Since at least February 26, 2015, Volkswagen has maintained a form Agreement to Arbitrate which it has required certain of its employees to sign as a condition of their employment. (S.F. ¶¶ 12-14.[1]) The Agreement contains the following relevant provisions:

[1] Citations to "S.F. ¶ __" are citations to the corresponding paragraph of the Joint Stipulation of Facts, which was submitted to the Board on September 2, 2016 via the parties' Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts ("Joint Motion"). The Joint Motion contains both the Joint Stipulation of Facts and the Stipulated Record.

1) Introduction. In any organization, disputes will arise from time to time. Occasionally, these disputes need to be resolved in a formal proceeding. Traditionally, this has taken place in the courts after a lawsuit has been filed. However, too often, our court system has proven itself to be exceedingly costly and time-consuming. In order to obtain a ruling on future disputes without the costly expense and lengthy delays typically associated with court actions, Employee and [Volkswagen] agree to submit (with exceptions noted below) claims or controversies relating to Employee's employment (or the termination of that employment) to final and binding arbitration before a neutral arbitrator and not to any court, as specified in greater detail below.

2) Submission to Arbitration. Any and all disputes which involve or relate in any way to Employee's employment (or termination of employment) with [Volkswagen], whether initiated by Employee or by [Volkswagen], shall be submitted to and resolved by final and binding arbitration. However, nothing in this Agreement shall be construed to restrict or prevent either party from pursuing injunctive relief in a court of competent jurisdiction.

. . .

4) Covered Claims. This Agreement is intended to cover all civil claims which relate in any way to my employment (or termination of employment) with [Volkswagen] including, but not limited to, arbitrable claims of employment discrimination or harassment on the basis of race, sex, age, religion, color, national origin, sexual orientation, disability and veteran status (including any local, state or federal law concerning employment or employment discrimination), claims based on violation of public policy or statute, and claims against individuals or entities employed by, acting on behalf of, or affiliated with [Volkswagen] ("Claims"). However, claims for workers' compensation or for unemployment compensation benefits are not covered by this Agreement. Nor are claims for injunctive or equitable relief to enforce non-competition or non-solicitation covenants, or to prohibit unfair competition or the unauthorized disclosure of trade secrets or other proprietary information covered by this Agreement. Finally, union related matters or disputes governed by a collective bargaining agreement and ERISA matters which are covered by an ERISA plan with a dispute resolution provision are not covered by this Agreement. The statutes of limitation otherwise applicable under law shall apply to all Claims made in the arbitration.

(S.R. Ex. 8[2], Agreement, ¶¶ 1-2, 4.)

On October 28, 2015, the Board's Region 13 Office (the "Regional Office") issued a complaint against VCI, alleging that the Agreement violates the Act because employees would reasonably believe it restricts their right to file Board charges. (S.R. Ex. 3.)

On October 30, 2015, VCI issued a notice to its employees. (S.F. ¶ 16; S.R. Ex. 9.) On January 27, 2016, VWGoA issued a very similar notice to its employees. (S.F. ¶ 17; S.R. Ex. 10.) In relevant part, the Notices state substantially as follows:

> Recently the National Labor Relations Board ("NLRB") looked at our form of Arbitration Agreement. The Board thought that we could be clearer that the Arbitration Agreement does not restrict your rights to file charges with the NLRB. We agree.
>
> Because you are always free to join a union and file charges with the NLRB, we will read your Arbitration Agreement to include the following:
>
> **"This Agreement does not restrict your rights to file charges with the NLRB."**
>
> . . .
>
> If you have any questions, please don't hesitate to contact [Human Resources]. Also, you can always contact the NLRB about your rights under the National Labor Relations Act.

(S.R. Ex. 10; *see also* S.R. Ex. 9 (same, with minor wording, capitalization, and formatting differences, and stating that "[w]e agreed to make this clarification," rather than "[w]e agree."))

On March 31, 2016, the Regional Office issued a complaint against VWGoA alleging that the Agreement violates the Act because employees would reasonably believe it restricts their right to file Board charges. (S.R. Ex. 4.) The complaint was issued as part of an order that consolidated the cases against VCI and VWGoA. (*Id.*) The Regional Office amended its complaint on April 6, 2016. (S.R. Ex. 5.)

[2] Citations to "S.R. Ex. __" are citations to the corresponding exhibit of the Stipulated Record.

Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, the parties waived an ALJ hearing, agreed on stipulated facts and a stipulated record, and transferred the case to the Board. The case is now ripe for decision.

STATEMENT OF ISSUES PRESENTED

A. Whether Respondents' mandatory arbitration agreement interferes with, restrains, or coerces employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.

B. Whether Respondents' Notices to Employees met the Act's full remedial purposes.

(Joint Motion, at *2.)

ARGUMENT

I. LEGAL STANDARD.

In *Martin Luther Memorial Home, Inc., d/b/a Lutheran Heritage Village-Livonia* ("*Lutheran Heritage*"), 343 NLRB 646 (2004), the Board articulated the standard governing whether an employer's work rule violates the Act. Rules that explicitly restrict Section 7 activity violate the Act. *Id.* at 646-47. In addition, rules that do not explicitly restrict Section 7 activity nonetheless violate the Act if one of the following is true: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

To Volkswagen's knowledge, the General Counsel does not contend that the Agreement or Amended Agreement explicitly restrict Section 7 activity, that they were promulgated in response to union activity, or that Volkswagen applied them to restrict the exercise of Section 7 rights. Rather, this proceeding involves only so-called "prong one" of *Lutheran Heritage*:

whether employees would "reasonably construe" the Agreement or Amended Agreement to prohibit Section 7 activity—in this case, filing charges with the Board.

In deciding whether employees would reasonably construe a rule to prohibit Section 7 activity, *Lutheran Heritage* mandates that the Board "give the rule a reasonable reading" and "refrain from reading particular phrases in isolation," instead considering the effect of the rule when read as a whole. *Id.* at 646. The Board also cautioned that it "will not conclude that a reasonable employee *would* read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way." *Id.* at 647 (first emphasis added). The Board expressly declined to take an approach that would find a violation "whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." *Id.* Additionally, in applying its standard to the facts, the *Lutheran Heritage* Board found that employees would "realize the lawful purpose" of the challenged rule (a workplace conduct rule) rather than presuming that the rule would restrict Section 7 activity. *Id.* at 647-48.

Another Board decision, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), governs whether Volkswagen's Notices successfully repudiated the original Agreement's alleged unlawfulness. Under *Passavant*, an employer may "relieve himself of liability for unlawful conduct by repudiating the conduct." *Id.* at 138. In order to be effective, a repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Id.* In addition, there must be "adequate publication" of the repudiation to employees and there must be "no proscribed conduct on the employer's part after the publication." *Id.* Finally, the repudiation should "give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." *Id.* at 138-39.

II. A REASONABLE EMPLOYEE WOULD NOT CONSTRUE THE AGREEMENT TO PROHIBIT FILING BOARD CHARGES.

A. The Agreement's Introduction Plainly Limits It to Disputes Traditionally Resolved Through a Lawsuit Filed in a Court.

A reasonable employee would not construe the Agreement to prohibit filing Board charges because the Agreement's introduction unambiguously limits it to disputes that traditionally have been resolved via a lawsuit filed in a court.

The Agreement's first paragraph, entitled "Introduction," reads as follows:

> Introduction. In any organization, disputes will arise from time to time. Occasionally, these disputes need to be resolved in a formal proceeding. Traditionally, this has taken place in the courts after a lawsuit has been filed. However, too often, our court system has proven itself to be exceedingly costly and time-consuming. In order to obtain a ruling on future disputes without the costly expense and lengthy delays typically associated with court actions, Employee and [Volkswagen] agree to submit (with exceptions noted below) claims or controversies relating to Employee's employment (or the termination of that employment) to final and binding arbitration before a neutral arbitrator and not to any court, as specified in greater detail below.

(Agreement ¶ 1.) The introduction makes clear that the focus of the Agreement is "disputes" that have "[t]raditionally" been resolved "in the courts after a lawsuit has been filed." The Agreement then explains that its purpose is to avoid the court system, which it characterizes as "exceedingly costly and time-consuming." To avoid these problems with the court system, the Agreement states that the parties agree to submit covered claims to arbitration "and not to any court."

Employees reading the Agreement would be reading it in the context of the question of how best to resolve a potential dispute with their employer. When a workplace dispute arises, employees understand that they generally have three ways to resolve the dispute. *First*, they can use internal dispute resolution mechanisms, such as engaging their supervisor or the human

resources department to address the concern. *Second*, they know that if that internal process does not resolve the dispute they can seek help from the government to assist in resolving the dispute. For example, employees are familiar with their rights (pursuant to required posters and other general familiarity) go to the EEOC with a dispute involving workplace discrimination or the NLRB with a dispute involving a workplace rule that is negatively impacting employees' working conditions. *Third*, if the internal dispute resolution or governmental procedures do not adequately address the issue, Employees know that they can look to our court system to resolve the issue.

A reasonable employee would understand that, in light of the introduction, the Agreement involves only the last of these three dispute-resolution mechanisms: the court system. In other words, an employee would understand that the Agreement merely moves the court-based dispute resolution process from the courts to arbitration, and does not impact her ability to seek the help of governmental agencies as compared to suing her employer. Therefore, the employee would not understand the Agreement to prohibit filing charges with the Board. By definition, Board charges must be filed with the Board and are therefore not "traditionally" resolved "in the courts after a lawsuit has been filed." In other words, Board charges are not among the types of disputes that the Agreement seeks to compel to arbitration.

Moreover, aside from the specific language of the introduction, a reasonable employee would understand that the purpose of the Agreement is to avoid costly and time-consuming *court* process. The Board is not a court, and the introduction certainly does not express any view that the Board's proceedings are costly or time-consuming. Thus, requiring employees to forego filing Board charges and instead resolve such disputes in arbitration would do nothing to accomplish the purpose of the Agreement. Further, although laypeople (including employees)

have long been familiar with the sentiment that the courts can be—at least at times—slow and costly[3], there is no similar widely recognized sentiment regarding unfair labor practice proceedings before the Board. Indeed, if an employee had any view of unfair labor practice proceedings, he would be likely to view them as more efficient and less expensive than court proceedings—not least because the General Counsel prosecutes the unfair labor practice charge at no cost to the employee. A reasonable employee would therefore have no reason to conflate Board charges with the court proceedings that the Agreement seeks to avoid by substituting arbitration.

B. The Precedent Cited By the General Counsel Does Not Require the Board to Find the Agreement to Be Unlawful.

The General Counsel's Statement of Position contends that reasonable employees would construe the Agreement to cover the filing of unfair labor practice charges due to the Agreement's language describing covered claims. (S.R. Ex. 11, at *1-2.) In particular, the General Counsel cites the provisions of the Agreement stating that it covers "all civil claims which relate in any way to my employment (or termination of employment) . . . [and] claims based on violation of public policy or statute," (Agreement ¶ 4), and that it covers "any and all disputes which involve or relate in any way to Employee's employment (or termination of employment)," (Agreement ¶ 2). The General Counsel cites *U-Haul Co. of California*, 347 NLRB 375 (2006), in support of the contention that such language renders the Agreement unlawful. Although the General Counsel is correct that *U-Haul* and other Board decisions have found that broad language such as that contained in the Agreement can render an arbitration provision unlawful, such cases are not dispositive here.

[3] *E.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (Federal Arbitration Act was passed in part due to Congress's recognition of popular "agitation against the costliness and delays of litigation" (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

U-Haul was, of course, decided under the *Lutheran Heritage* standard, which requires the Board to consider the work rule as a whole, without "reading particular phrases in isolation." *Lutheran Heritage*, 343 NLRB at 646. Under that standard, the Board must presume that a reasonable employee would read both the introduction section and the provisions that the General Counsel cites. Moreover, Volkswagen submits that a reasonable employee would attempt to read two contractual provisions to be consistent when such a reading is possible.[4] Under such a reading, it is clear that the Agreement covers "all civil claims," or "any and all disputes" that relate to the employee's employment *and* traditionally would be the subject of lawsuits filed in a court.

Volkswagen stresses that, unlike the Agreement here, the arbitration provision in *U-Haul* did not have an introductory section explaining its purpose (or, at least, no mention was made of any such section in the Board's or ALJ's decision). Instead, the *U-Haul* arbitration provision was issued along with a memo that included a section entitled "What is Arbitration." *U-Haul*, 347 NLRB at 377. That section stated that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief." *Id.* The employer argued that the memo limited the otherwise broad definition of covered claims in the arbitration provision. *Id.* The Board rejected that argument for two reasons, neither of which apply in this case.

First, the Board found that nothing in the relevant portion of the (separately issued) memo "reasonably suggests that its intent is to modify the policy language." *Id.* But here, the

[4] A well-known canon of contractual construction is that a court should read a contract to harmonize its provisions, if possible. *E.g.*, Restatement (Second) Contracts §§ 202-03 (1981); *Seabury Const. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63, 69 (2d Cir. 2002). Although a non-lawyer employee would not necessarily be familiar with that canon of construction, the canon is relevant because it is based on the common-sense notion that parties generally do not intend their contracts to contain irreconcilable conflicts. A reasonable employee would exercise similar common sense and recognize that his employer would not intend its policy to be self-contradictory.

introduction to the Agreement is not contained in a separate document; rather, it is part and parcel of the Agreement and is even contained in one of the Agreement's numbered paragraphs, rather than the preamble. In fact, because it is contained in the first paragraph of the Agreement, the introduction is the very first provision that an employee would read. There is no question that a reasonable employee would understand the introduction to have just as much binding force as any other part of the Agreement, and thus it must be considered in order to give the Agreement the fair and holistic reading that *Lutheran Heritage* requires.

Second, the Board reasoned that, because Board decisions can be appealed to a United States court of appeals, the memo's language did not effectively exclude unfair labor practice charges. *Id.* at 377-78. This reasoning underscores a crucial linguistic difference between the *U-Haul* memo and the Agreement's introduction: the *U-Haul* memo's language refers to courts' *powers*, but the Agreement's introduction refers to litigants' routine *practice*. Thus, the memo fails to exclude Board charges because it only limits arbitration to disputes that a court would be "authorized to entertain" or would "have jurisdiction" over, and certainly the United States courts of appeals are authorized to entertain and have jurisdiction over Board unfair labor practice decisions. In contrast, by focusing on "disputes" that have "[t]raditionally" been resolved "in the courts after a lawsuit has been filed," the Agreement's introduction successfully excludes Board charges. Board charges are not traditionally the subject of a lawsuit filed in a court; they are traditionally the subject of an administrative proceeding filed before the Board. Although they are *appealable* to a court, that is different from being filed in a court in the first instance. Moreover, the introduction's final statement that the parties will submit their disputes to an arbitrator "and not to any court" necessarily refers to a *trial* court, because that is the type of court to which disputes are initially submitted.

Therefore, *U-Haul*'s discussion of the "What is Arbitration" memo section does not require the Board to find an unfair labor practice here.

In addition to *U-Haul*, the General Counsel may cite *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015). That case involved an arbitration agreement that included an explanatory phrase stating that the "purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims." *Id.*, slip op. at 2. Applying *U-Haul*, the Board found that a mere reference to the court system does not clarify that an otherwise-broad arbitration provision excludes unfair labor practice charges. *Id.*, slip op. at 2-3. Additionally, the Board noted that the language designating arbitration as the "exclusive forum" detracted from the explanatory phrase and, counterproductively, reinforced the notion that Board charges are forbidden. *Id.* Like *U-Haul*, *Countrywide* does not control in this case.

It is important to understand the context in which *Countrywide*'s explanatory phrase arose. The phrase was buried in a verbose section of the contract that otherwise operated to define the covered claims broadly. *Id.*, slip op. at 1-2 n.3. In contrast, here the Agreement's introduction stands alone in its own section of the contract, separate from the section defining covered claims. In addition, the introduction goes into detail regarding Volkswagen's rationale for adopting the Agreement—a rationale which singles out court process, not Board process. The *Countrywide* explanatory phrase contains no similar rationale. Finally, unlike in *Countrywide*, the Agreement's introduction does not contain any language designating arbitration as the "exclusive forum" for dispute resolution. Thus, when read in context as *Lutheran Heritage* requires, a reasonable employee would read the Agreement's introduction quite differently than *Countrywide*'s explanatory phrase.

Finally, the General Counsel notes that the Agreement explicitly exempts certain claims from its scope but that the exemptions do not include Board charges. (S.R. Ex. 11, at *2; Agreement ¶ 4.) The General Counsel's implication is that a reasonable employee, not seeing Board charges listed among the exemptions, would presume that Board charges are covered by the Agreement. But again, this section must be understood in the context of the whole Agreement, including the Agreement's stated purpose of substituting arbitration in place of slow and expensive court process.

Depending on context, any list can be read either as a complete and exhaustive list or as a non-exclusive list of examples. A reasonable employee would understand that the Agreement's list of exempted claims is merely a list of examples. As discussed above, employees know that they can resolve disputes with their employers in three ways: by utilizing internal employer processes, by seeking help from the government, and by filing a lawsuit. Here, the list of exempted claims includes many types of disputes that are traditionally resolved via the second method—seeking help from the government (*e.g.*, claims for workers' compensation, unemployment compensation, union-related matters, and disputes governed by a collective bargaining agreement, among others). (Agreement ¶ 4.) A reasonable employee would understand that, having already made clear that its Agreement is intended to apply to disputes traditionally resolved via the third method (filing a lawsuit in court), Volkswagen is simply attempting to further clarify, through examples, that disputes traditionally resolved via the second method (seeking help from the government) are *not* covered by the Agreement. Thus, an employee would not conclude that she must submit Board charges to arbitration merely because the list does not specifically refer to Board charges. In fact, the list would reinforce a reasonable

employee's conclusion that Board charges, like other government-based dispute resolution methods, are not covered by the Agreement.

Therefore, a reasonable employee, reading the Agreement as a whole, would not think that it prohibits her from filing Board charges.

III. THE NOTICES REPUDIATE ANY PURPORTED UNLAWFULNESS IN THE AGREEMENT.

For the reasons set forth above, the Agreement does not violate the Act. But even if, *arguendo*, the Agreement violated the Act, the Notices repudiate any violation because they meet the Board's *Passavant* standard.

Under *Passavant*, a repudiation must be (1) timely, (2) unambiguous, (3) specific in nature to the coercive conduct, (4) free from other proscribed illegal conduct, (5) adequately published to the affected employees, and (6) assure employees that in the future their employer will not interfere with the exercise of their Section 7 rights; additionally, (7) there must be no proscribed conduct on the employer's part after the publication. 237 NLRB at 138-39.

As an initial matter, the Notices meet numbers (5) and (7) above—they were adequately published and there was no proscribed conduct by Volkswagen after the publication. The Notices were published in exactly the same manner as the Board generally requires its own notices to be published: they were posted in cafeterias for at least 60 days and they were also emailed to employees. And the General Counsel has not alleged that Volkswagen committed any other unfair labor practice or violation of the Act *after* it published the Notices. Volkswagen does not understand the General Counsel to contest that it satisfied these elements of the *Passavant* test.

Instead, the General Counsel contends that the Notices fail to satisfy numbers (1), (3), and (6) above—that the Notices were not timely, were not specific in nature to the coercive

conduct, and did not assure employees that in the future Volkswagen would not interfere with their Section 7 rights.[5] The General Counsel is mistaken.

A. The Notices Were Timely Because Volkswagen Issued Them Promptly Upon Learning That the Regional Office Considered the Agreement to Be Unlawful.

The General Counsel argues that the Notices were not timely because they were published more than six months after the original Agreement was put into effect. Although the Board has generally required repudiations to occur more quickly than that in order to satisfy *Passavant*'s "timely" requirement, the Board has made exceptions in cases where the employer's repudiation, although not timely with respect to when the allegedly unlawful conduct occurred, was timely with respect to when the employer *discovered* the unlawful conduct. This is just such a case, and Volkswagen contends that the exception should apply here.

In *Broyhill Co.*, 260 NLRB 1366, 1366 (1982), a supervisor made statements to employees that violated the Act, but the employer was not aware of the statements when they were made. The employer first learned of the statements five weeks later, when it met with a Board investigator who informed the employer of the supervisor's unlawful conduct. *Id.* The next day, the employer posted a notice repudiating the supervisor's statements. *Id.*

The Board found that, because the employer "acted in good faith and lacked knowledge" of the unlawful conduct until just before it posted the notice, the repudiation was timely despite the five-week delay. *Id.* In so ruling, the Board cautioned against reading *Passavant* in a "highly technical and mechanical manner," and noted that in litigated cases Board notices are generally posted well over a year after the unlawful conduct. *Id.* A five-week delay was minor

[5] Volkswagen also presumes that the General Counsel disputes numbers (2) and (4) above—whether the Notices were unambiguous and free from other unlawful conduct—because the General Counsel contends that the Amended Agreement (consisting of the Agreement as modified by the Notices) remains ambiguous and continues to violate the Act. But for the reasons explained in Section IV., *infra*, the Amended Agreement is not ambiguous and does not violate the Act.

in comparison. *Id.*; *see also Stanton Indus., Inc.*, 313 NLRB 838, 848-49 & n.64 (1994) (ALJ opinion, adopted by Board) (repudiation effective despite occurring 25 days after the unlawful conduct; employer was not aware of the unlawful conduct until 20 days after it occurred).

Similarly, in *Extendicare Health Services, Inc.*, 350 NLRB 184, 192 (2007) (ALJ opinion, adopted by Board in relevant part), the General Counsel alleged that an employer improperly increased meal prices without bargaining with the union. The Board adopted the ALJ's finding that, even if the employer's actions were unlawful, the employer had repudiated its violation via a notice disavowing the price increase. *Id.* at 193. Notably, the employer had announced the price increase on January 22, 2004 but did not issue a statement repudiating it until April 30 of the same year, over three months later. *Id.* at 192. However, the repudiation occurred the same day that the Regional Office informed the employer that it was filing a complaint against the employer—thus putting the employer on notice that Regional Office viewed the price increase as unlawful. *Id.*

Here, like in *Broyhill* and *Extendicare*, Volkswagen acted promptly to issue the Notices as soon as the Regional Office informed it that the Regional Office viewed the Agreement as unlawful. VCI issued its Notice on October 30, 2015, only two days after it had been served with the complaint. (S.R. Exs. 3, 9.) And VWGoA issued its Notice on January 27, 2016, more than two months *before* the Regional Office issued any complaint against it. (S.R. Exs. 4, 10.)

Moreover, it was reasonable for Volkswagen to wait to issue the Notices until the Regional Office issued a complaint. The Agreement is facially neutral and does not make any mention of the Act or of employees' right to file Board charges. Thus, there was no reason for

Volkswagen to have anticipated that the Regional Office would view the Agreement as unlawful until the Regional Office informed Volkswagen of its views by issuing a complaint.[6]

Volkswagen notes that, like the employer in *Broyhill*, it could have elected to remain silent and wait until the Board issued a ruling, in which case any required Board notice would not have been posted until over a year after the dates of the complaints. However, although Volkswagen disagreed (and continues to disagree) that the Agreement was unlawful, Volkswagen voluntarily issued the Notices in order to address the Regional Office's concerns about the lawfulness of the Agreement. Volkswagen's voluntary remedial action was in accordance with the Board's goal of encouraging voluntarily compliance with the law, as well as the Board's goal of avoiding litigation where possible. *See* NLRB Casehandling Manual for Unfair Labor Practice Proceedings ("Casehandling Manual") § 10124.1.

B. The Notices Are Specific Because They Identify the Arbitration Agreement and Clarify that It Does Not Prohibit Filing Board Charges.

The General Counsel also argues that the Notices are not "specific in nature to the coercive conduct." The General Counsel is mistaken because the plain text of the Notices demonstrates that they are specific. In relevant part, the Notices state substantially as follows:

> Recently the National Labor Relations Board ("NLRB") looked at our form of Arbitration Agreement. The Board thought that we could be clearer that the Arbitration Agreement does not restrict your rights to file charges with the NLRB. We agree.
>
> Because you are always free to join a union and file charges with the NLRB, we will read your Arbitration Agreement to include the following:
>
> **"This Agreement does not restrict your rights to file charges with the NLRB."**

[6] Although the Board has held other facially neutral agreements to be unlawful, Volkswagen's Agreement differs from those agreements due to its introduction section. *See* Section II.B., *supra*. Thus, the Board's decisions did not place Volkswagen on notice that the Regional Office would view its particular agreement as unlawful.

(S.R. Ex. 10; *see also* S.R. Ex. 9 (same, with minor wording, capitalization, and formatting differences, and stating that "[w]e agreed to make this clarification," rather than "[w]e agree.")) The Notices clearly identify the workplace policy at issue: the Arbitration Agreement. Further, they identify the reason why the Regional Office (and now, the General Counsel) contends that the Agreement is unlawful: that it is not sufficiently clear and thus may be understood to prohibit employees from filing Board charges. The language of the remedy, too, specifically assures employees that Volkswagen will read the Agreement not to restrict their rights to file Board charges.

The specificity of the Notices stands in contrast to decisions in which the Board found the employer's repudiation insufficiently specific. In *Passavant* itself, the Board found that an employer's newsletter disavowing an employee's unlawful statement was not effective in part because it did not identify the employee or the context in which the statement was made. 237 NLRB at 139; *see also, e.g.*, *In re Cmty. Action Comm'n of Fayette Cty., Inc.*, 338 NLRB 664, 666-67 (2002) (statement that employees would not be fired for supporting union not specific enough to repudiate threat that employee would lose her job if union won election); *CMI-Dearborn, Inc.*, 327 NLRB 771, 782-83 (1999) (ALJ opinion, adopted by Board) (statement that employer would not make threats of "plant closure, [or] job loss" not specific to employer's wide-ranging misconduct, including interrogating employees regarding union activity, creating an impression of surveillance, and threatening an employee with death).

Here, however, the Notices identify the exact policy at issue, the reason the Regional Office objected to the policy, and the remedy that addresses the Regional Office's objection. *See Extendicare*, 350 NLRB at 193 (text of notice, found to be effective repudiation, makes clear that the relevant employer action was increasing meal prices without bargaining with union and

informs employees that price increase will be rescinded); *Stanton Indus.*, 313 NLRB at 848-49 (text of notice, found to be effective repudiation, makes clear that relevant conduct was supervisor's comment to employee regarding union, even identifying date and place conduct occurred); *Gaines Elec. Co.*, 309 NLRB 1077, 1080-81 (1992) (text of notice, found to be effective repudiation, makes clear that relevant conduct was company president's statements to employees regarding union); *Broyhill*, 260 NLRB at 1367 (text of notice, found to be effective repudiation, makes clear that the relevant supervisor's conduct involved pressuring employees for information about the union's business as well as their personal union activities).

C. The Notices Assure Employees That Volkswagen Will Not Interfere with Their Section 7 Rights in the Future.

Finally, the General Counsel incorrectly contends that the Notices fail to assure employees that in the future Volkswagen will not interfere with the exercise of their Section 7 rights. In fact, the Notices do just that: they inform employees that they may file charges with the NLRB and that Volkswagen will read the Agreement not to impinge on those rights. (S.R. Exs. 9, 10.) The Notices therefore assure any employee who might have previously felt that the Agreement prevents him from filing Board charges that, now and in the future, Volkswagen will not interfere with the filing of Board charges. *Extendicare*, 350 NLRB at 193 (notice rescinding meal price increase due to employer's failure to bargain with union implicitly provided reassurances that employer would not in the future increase meal prices without bargaining).

In sum, *Broyhill* stressed that the employer in that case "did all that it reasonably could do" to cure the alleged unlawfulness, and cautioned that the requirements in *Passavant* not be applied in too technical a fashion where the employer has acted in good faith. 260 NLRB at 1366-67. The same approach should apply here: by publishing the Notices promptly after (or even before) the filing of the Regional Office's complaints, Volkswagen acted in good faith and

did all that it reasonably could do to cure any alleged unlawfulness in the Agreement. Therefore, the Board should find that Volkswagen successfully repudiated any unlawful conduct.

IV. A REASONABLE EMPLOYEE WOULD NOT CONSTRUE THE AMENDED AGREEMENT TO PROHIBIT FILING BOARD CHARGES.

Having explained why the original Agreement was lawful—or, even if it was not lawful, why Volkswagen repudiated any alleged unlawfulness—Volkswagen now turns to the Amended Agreement, which is the arbitration provision currently in effect.

A. The Amended Agreement Does Not Violate the Act Because It Specifically Permits Employees to File Board Charges.

The Amended Agreement clearly does not violate the Act. This is because the Amended Agreement includes the express statement, "[t]his Agreement does not restrict your rights to file charges with the NLRB." (S.R. Exs. 9, 10.) In light of that statement, a reasonable employee certainly would not think that the Amended Agreement restricts her right to file Board charges.

Under *Lutheran Heritage*, the Board must view the Amended Agreement as a reasonable employee would. Simply put, a reasonable employee would not interpret an agreement to have an effect that is the exact opposite of one of its express and specific provisions. It is simply not reasonable for anyone to read a contractual provision stating that the contract "does not" have a certain effect but to conclude that, in fact, the contract "does" have that effect. As the Fifth Circuit held in *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1020 (5th Cir. 2015), "it would be unreasonable for an employee to construe [an agreement] as prohibiting the filing of Board charges when the agreement says the opposite."

B. The Amended Agreement Does Not Contain Any Language That Would Render Its Clear Savings Clause Unlawful Under Board Precedent.

No Board decision requires a contrary result. Although the Board has ruled that certain savings clauses are insufficient, those decisions do not apply because the Amended Agreement's savings clause is clearer than the savings clauses rejected by the Board in those decisions.

Volkswagen is aware of a line of Board cases finding that a generically worded "savings clause" (for example, a clause limiting the contract's scope to disputes "that may be lawfully resolved by arbitration," or exempting any claim where "an agreement to arbitrate [the] claim is prohibited by law") will not prevent a finding that an otherwise broadly worded arbitration provision violates the Act. *E.g.*, *2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1817 (2011); *Countrywide*, 362 NLRB No. 165, slip op. at 1-3. But those cases were decided under the principle that a reasonable employee is not a lawyer and should not be charged with knowledge of the law's intricacies, particularly the restrictions that the Act places upon arbitration agreements. *E.g.*, *ids.* In contrast, no specialized legal knowledge is required to understand that an agreement permits the filing of Board charges when the agreement specifically states that it "does not restrict your rights to file charges with the NLRB," which is exactly what the Amended Agreement does. (S.R. Exs. 9, 10.)

In addition, Volkswagen is aware of recent cases in which the Board held that even a *specific* savings clause (one stating that employees retain the right to file Board charges) could not render an arbitration provision lawful under the Act, but those cases do not apply here.[7]

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[7] The General Counsel cites to *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015), (S.R. Ex. 11, at *2), but those cases do not express the Board's reasoning on this point.

In *Neiman Marcus*, the employer did not contest the relevant reasoning of the ALJ, so the Board upheld the ALJ's finding "in the absence of argument." 362 NLRB No. 157, slip op. at 1 n.4. Further, the arbitration provision in *Neiman Marcus* consisted of a cluster of applications, handbooks, acknowledgment forms, and policies, nearly all of which "expressly state[d] that disputes . . . must be resolved through arbitration" but only one of which expressly

In *SolarCity Corp.*, 363 NLRB No. 83 (2015), and *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016), the Board considered whether two arbitration provisions violated the Act. The *SolarCity* provision included a savings clause stating, in relevant part:

> [T]his Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute . . . or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.

363 NLRB No. 83, slip op. at 4. Likewise, the *Securitas* provision included the following very similar savings clause:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board (www.nlrb.gov) . . . .

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exempted filing Board charges. *Id.*, slip op. at 11 (ALJ opinion). That is not the case here: the Amended Agreement consists of only two documents, one of which expressly modifies the other.

In *D.R. Horton*, the employer had distributed a list of frequently asked questions to its supervisors, and one of the responses was to tell employees "that they would still be able to bring complaints to the EEOC or similar agencies." 357 NLRB at 2278 n.2. However, the Board found that there was no evidence that this explanation was ever communicated to the employees, and therefore did not address how employees would have interpreted the contract in light of the frequently asked questions. *Id.*

Finally, in *Murphy Oil*, the employer had revised its agreement to state that it did not prohibit employees from "participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board." 361 NLRB No. 72, slip op. at 4. The Board did not specifically address whether a reasonable employee would construe the revised agreement to prohibit the filing of Board charges, instead concluding that the revised agreement was unlawful because the new provision failed to controvert the original agreement's unlawful *class action waiver*. *Id.*, slip op. at 19. The Board also noted in passing that "one could argue" that the *class action waiver* "prohibits individual employees from filing administrative claims to begin with, since such a claim could be construed as having 'commence[d]' a class action in the event that the agency decides to seek classwide relief." *Id.*, slip op. at 18.

Volkswagen's agreement does not contain a class action waiver, and the General Counsel has not alleged that the Agreement or the Revised Agreement restrict employees' rights to seek classwide relief. Therefore, the Board's *Murphy Oil* reasoning does not apply. In any event, as explained above, the Fifth Circuit rejected any suggestion by the Board that the class action waiver would cause a reasonable employee to "construe the [revised agreement] as prohibiting the filing of Board charges when the agreement says the opposite." 808 F.3d 1013 at 1020.

363 NLRB No. 182, slip op. at 2. In both cases, the Board found the savings clause to be insufficient for the same reason. Although both arbitration provisions included express statements that employees could file Board charges, the Board found that the language preceding those statements rendered the savings clause as a whole "vague[]," "confus[ing]," and "ambiguous." *SolarCity*, 363 NLRB No. 83, slip op. at 4-6; *Securitas*, 363 NLRB No. 182, slip op. at 3-5. In particular, the Board found that employees would not understand the language referring to what "applicable law permits" and (in *SolarCity*) claims that are "excluded from arbitration by statute" because they lack the specialized legal knowledge to determine the meaning of these phrases. *Ids.* Even if the final sentence of each clause were clear on its own, employees would have trouble understanding that sentence when read in conjunction with the preceding "caveats," which they lacked the specialized knowledge to interpret. *See ids.* The Board invoked its policy that any ambiguity in the employer's work rule must be construed against the employer and reasoned that, when faced with such vague, confusing, and ambiguous language, employees might hesitate to exercise their rights to file Board charges for fear of running afoul of the arbitration provision. *Ids.* Because Congress intended employees to have "compete freedom" to file Board charges, the Board found this chilling effect to be sufficient to render the agreements unlawful, despite the savings clauses. *Ids.*

The analysis in *SolarCity* and *Securitas* does not apply here because the language that the Notice added to the Agreement is not surrounded by similar vague, confusing, or ambiguous "caveats." Indeed, the Notice adds only one sentence to the Agreement. That sentence is set off from the rest of the text and enclosed in quotes in order to distinguish it from the remainder of the Notice. (S.R. Exs. 9 & 10.) Further, that sentence is perfectly clear: "[t]his Agreement does not restrict your rights to file charges with the NLRB." (*Ids.*)

Because the Notice adds only one sentence to the Agreement, there is no need to consider the remainder of the Notice, but even if the Board were to do so, the remainder of the Notice only underscores that employees *do* have the right to file Board charges. The sentences immediately preceding the added language state that the employee that is "always free . . . to file charges with the NLRB" or that it is the employee's "legal right to . . . file charges with the NLRB." (*Ids.*) Unlike the "caveats" at issue in *SolarCity* and *Securitas*, no law degree is required to understand what these phrases mean; they plainly support the employee's right to file Board charges. Finally, if there were any remaining doubt, the language at the bottom of the Notices reminds employees that they can always contact the NLRB about their rights under the Act. (*Ids.*) Thus, in the unlikely event that an employee were somehow confused by the new contract language, the Notices do not seek to chill that employee's rights but rather invite him to contact the Board and learn his rights directly from the source. (*Ids.*)

Thus, the Amended Agreement suffers from none of the ambiguity that the Board found in *SolarCity* and *Securitas*. Indeed, it is perplexing that the General Counsel would describe the Amended Agreement as "woefully insufficient," (S.R. Ex. 11, at *2), when the language that Volkswagen added to the agreement mirrors the very language that the Board has consistently used in its own orders and notices. For example, in *SolarCity* the Board ordered the employer to "[r]escind the mandatory arbitration program . . . or revise it . . . to make clear to employees that . . . it does not bar or restrict employees' right to file charges with the National Labor Relations Board." 363 NLRB No. 83, slip op. at 6. Similarly, the Board notice issued in that case contained the phrase "WE WILL rescind the mandatory arbitration program . . . or revise it . . . to make clear that . . . it does not restrict your right to file charges with the National Labor Relations Board." *Id.*, slip op. at 12. Volkswagen, of course, has already amended its

agreements. And it is hard to imagine a better way to "make clear" to employees that an agreement "does not restrict [their] right to file charges with the [NLRB]" than to do exactly what Volkswagen has done: amend the Agreement to state, "[t]his Agreement does not restrict your rights to file charges with the NLRB."

C. The Language Covering "All Civil Claims" Does Not Render the Amended Agreement's Savings Clause Unlawful Under Board Precedent.

The General Counsel has argued that the Amended Agreement is nonetheless ambiguous when the language added by the Notice is read in conjunction with the language in paragraph four of the Agreement, which states that it covers "all civil claims which relate in any way to . . . state or federal law concerning employment or employment discrimination." (S.R. Ex. 11, at 2; Agreement ¶ 4.) But that is not what the Board held in *SolarCity* and *Securitas*. Rather, the Board stated that, as an initial matter, the broad language in the agreements covering "all" or "any disputes" would generally cause it to find the agreement unlawful. 363 NLRB No. 83, slip op. at 4; 363 NLRB No. 182, slip op. at 4. Then the Board considered whether the savings clauses (which expressly permitted employees to file Board charges) effectively controverted that broad language with respect to filing Board charges. 363 NLRB No. 83, slip op. at 5-6; 363 NLRB No. 182, slip op. at 4-5. The Board concluded that the answer to this question was no, *not* because the savings clauses were ambiguous when combined with the general, broad language covering "all" or "any disputes," but because the savings clauses were ambiguous when combined with the "caveats" that immediately preceded them and which employees lacked the specialized legal knowledge to understand. *Ids.* Because the savings clauses were ambiguous, they were ineffective, and so the uncontradicted broad language in the agreement compelled the Board to find the agreements unlawful. *Ids.*

Thus, the Board did not find that a specific savings clause somehow becomes ambiguous when read alongside a broad provision covering "all claims." Nor should the Board enter such a finding in this case, because a reasonable employee would not find those two types of provisions to be ambiguous. Rather, a reasonable employee would apply the common-sense notion that a specific provision trumps a general provision, particularly in the case of an exemption from an otherwise-broad rule.[8]

Indeed, recall that the General Counsel has argued in this case, with respect to the original (pre-amended) Agreement, that the fact that the original Agreement exempted certain specific claims *other* than Board charges proves the original Agreement *does cover* Board charges and is therefore unlawful.[9] The logic of that argument depends upon employees understanding that specific exemptions control over general language stating that "all claims" are covered. If the combination of specific and general instead rendered the exemptions ambiguous, employees would not understand that certain types of claims were exempted from the Agreement's scope. And without that understanding, employees could not reach the conclusion that Board charges are covered by virtue of not being listed among the exemptions. Thus, even the General Counsel's argument in this case presumes that employees would understand that a specific exemption controls over a broad and general rule.

Finally, another reason why an employee would not find the Amended Agreement's savings clause ambiguous when combined with the general provision in paragraph four is that the savings clause was adopted at a different point in time from the remainder of the Amended

[8] That the specific controls over the general is another well-recognized canon of contractual construction. *E.g.*, Restatement (Second) Contracts §§ 203 (1981); *Cty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001). Like the other canons mentioned in this brief, an employee would not be expected to be aware of this canon, but the canon is nonetheless relevant because it is based on common sense, and a reasonable employee would certainly exercise common sense.

[9] As explained in Section II.B., *supra*, this argument is invalid for other reasons.

Agreement. Even if a reasonable employee were somehow to become confused, he would be able to resolve the confusion by applying the common-sense notion that the later-adopted savings clause controls over the earlier-adopted language of paragraph four.[10]

D. In the Alternative, the Board Should Abandon Any Precedent That Would Render the Amended Agreement Unlawful.

For the foregoing reasons, the Amended Agreement does not violate the Act, and the Board's precedents do not require a contrary result. However, to the extent the Board disagrees and is inclined to find that its precedents in *SolarCity* and *Securitas* do require a contrary result here, Volkswagen respectfully submits that the Board should abandon those precedents because they are not supported by substantial evidence, they are not based on a reasonably defensible interpretation of the Act, and they fail to follow the Board's own binding precedent set forth in *Lutheran Heritage*.

Although courts must generally defer to the Board's interpretations of the Act and application of law to fact, they are obligated to invalidate the Board where it creates or applies law in an arbitrary or capricious fashion or where it violates the constitutional right to due process. *E.g.*, *Teamsters Local Union No. 455 v. N.L.R.B.*, 765 F.3d 1198, 1204 (10th Cir. 2014). Thus, courts must uphold the Board's interpretations of the Act if they are "reasonably defensible" and must approve the Board's factual determinations if supported by "substantial evidence." *E.g.*, *Murphy Oil*, 808 F.3d at 1017. In addition, the Board is not entitled to "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In other words, the Board "cannot ignore its own relevant precedent." *Comau, Inc. v. N.L.R.B.*, 671 F.3d 1232, 1236 (D.C. Cir. 2012).

[10] Indeed, yet another canon of contractual construction is that a modification controls over the original agreement in the event of a conflict. *E.g.*, *Large v. Mobile Tool Int'l, Inc.*, 724 F.3d 766, 772 (7th Cir. 2013).

Here, the Board's *SolarCity* and *Securitas* decisions run afoul of all of those limitations because they found that arbitration agreements would chill employees' exercise of their right to file Board charges despite that those agreements contained perfectly clear statements that they do *not* restrict the right to file Board charges.

1. The *SolarCity* and *Securitas* Decisions Are Not a Reasonable Interpretation of the Act.

As an initial matter, the *SolarCity* and *Securitas* decisions cannot be considered to be a reasonably defensible interpretation of the Act. Courts have, of course, deferred to the Board's interpretation of the Act as prohibiting employer policies that would chill employees' exercise of their rights to file unfair labor practice charges. *E.g.*, *Murphy Oil*, 808 F.3d at 1019. But that rationale does not apply here because the agreements in *SolarCity* and *Securitas* would not chill the filing of Board charges in the slightest. Simply put, no one—employee or otherwise, reasonable or otherwise—would interpret an agreement that expressly states that "permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board," 363 NLRB No. 83, slip op. at 4, or that "[c]laims may be brought before an administrative agency . . . . [S]uch administrative claims include . . . charges brought before . . . the National Labor Relations Board," 363 NLRB No. 182, slip op. at 2, to somehow mean that he *cannot* file a charge. Because they do not prevent a chilling of employees' rights, *SolarCity* and *Securitas* serve no purpose under the Act and, therefore, do not represent a reasonable interpretation of the Act.

2. The SolarCity and Securitas Decisions Misapply *Lutheran Heritage*.

Moreover, the *SolarCity* and *Securitas* decisions misapply the *Lutheran Heritage* test, which the Board is bound to follow unless and until it announces a new rule governing employer work policies.

The Board may not decide cases in a manner that is inconsistent with its own established precedent. *E.g.*, *Nat'l Labor Relations Bd. v. Sw. Reg'l Council of Carpenters*, 826 F.3d 460, 464-66 (D.C. Cir. 2016) (Board failed to apply precedent that, without more, mere presence of employer at union vote is not coercive); *Comau*, 671 F.3d at 1237-40 (Board failed to apply precedent that changes are implemented when announced, even if they do not immediately take effect); *Titanium Metals Corp. v. Nat'l Labor Relations Bd.*, 392 F.3d 439, 448-50 (D.C. Cir. 2004) (Board misapplied own precedent regarding whether grievance settlements are "fair and regular"); *N.L.R.B. v. Magna Corp.*, 734 F.2d 1057, 1061-63 (5th Cir. 1984) (Board failed to apply its own "community of interest" test in unit clarification case).

As discussed at length above, *Lutheran Heritage* asks whether "employees would reasonably construe the language" of a work rule "to prohibit Section 7 activity." 343 NLRB at 647. That case also requires the Board to avoid concluding that a "reasonable employee *would* read [a] rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way," and not to take an approach that would find a violation "whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable." *Id.* (first emphasis added). Although both *SolarCity* and *Securitas* purport to apply *Lutheran Heritage* and come to a conclusion about what a reasonable employee would do, the opinions' application of *Lutheran Heritage* is not faithful to the test espoused in that case.

As stated, a reasonable employee simply would not apply an arbitration provision like those in *SolarCity* or *Securitas* to mean the opposite of what it says. And even if, somehow, it were possible for an employee to arrive at such a reading, that is not enough under *Lutheran Heritage*: the Board must find not only that a reasonable employee *could* adopt such a reading, but that a reasonable employee *would* adopt such a reading. Thus, the Board would have to

conclude that a reasonable employee, when forced to choose between reading a rule to mean what it says versus reading a rule to mean the opposite of what it says, would choose the latter option. It is inconceivable that a reasonable employee would do that. The Fifth Circuit—to Volkswagen's knowledge, the only court that has weighed in on this question—expressly held as much in *Murphy Oil*, when it rejected the Board's finding that a similarly-worded arbitration provision violated the Act. 808 F.3d at 1020 (5th Cir. 2015) ("[I]t would be unreasonable for an employee to construe [an agreement] as prohibiting the filing of Board charges when the agreement says the opposite.") There is no reason to think that the other circuit courts of appeals would disagree with the Fifth Circuit on this straightforward point.

Moreover, although both *SolarCity* and *Securitas* purport to apply the Board's precedent and correctly note that employees lack the specialized legal knowledge to understand the language surrounding the savings clauses, the Board's conclusion that the surrounding language therefore renders the savings clauses "vague," "confusing," and "ambiguous" simply does not follow. *See* 363 NLRB No. 83, slip op. at 4-6; 363 NLRB No. 182, slip op. at 3-5. As a dissenting Member observed in both cases, it is clear from both agreements that the savings clause overrides the preceding technical legal language, not the other way around. 363 NLRB No. 83, slip op. at 9-11 (Member Miscimarra, dissenting); 363 NLRB No. 182, slip op. at 7-9 (Member Miscimarra, dissenting). The legal language simply does not detract in any way from the savings clause's clear statement that Board charges are not covered by the agreements. Thus, "the Agreements' *relevant* provisions merely require the ability to read and understand the English language." *Ids.*[11]

[11] Nor was the Board simply following *Lutheran Heritage*'s instruction to "read [the agreements] as a whole," as it claimed in defense of its reasoning. *See* 363 NLRB No. 83, slip op. at 5; 363 NLRB No. 182, slip op at 4.n 9. That instruction was not a pronouncement that nearby phrases necessarily must be interpreted to conflict with each other.

Further, as the dissenting Member observed, the Board's conclusion that the agreements were vague, ambiguous, and confusing is not sufficient under *Lutheran Heritage* to invalidate the agreements. 363 NLRB No. 83, slip op. at 10 & n. 16 (Member Miscimarra, dissenting); 363 NLRB No. 182, slip op. at 8n. 16 (Member Miscimarra, dissenting). Again, *Lutheran Heritage* made clear that the Board must base its decision on how a reasonable employee would read the agreements, not on how a reasonable employee could read the agreements. But concluding only that agreements are vague, ambiguous, and confusing does not explain how a reasonable employee *would* read them; it merely establishes that there is more than one possible way that a reasonable employee *could* read them. *Ids.* Thus, the Board invalidated the agreements based on how employees could read them, which is expressly prohibited by *Lutheran Heritage.*

For the foregoing reasons, whatever the test the Board applied in *SolarCity* and *Securitas*, it was not the test espoused in *Lutheran Heritage*. Rather than deciding what a reasonable employee would do, the Board appeared to base its decision off of what a patently unreasonable employee might conceivably do. As such, *SolarCity* and *Securitas* either failed to apply the Board's own precedent or tacitly adopted a new and unprecedented rule without announcing they were doing so or explaining the reasons for the change. Either way, the decisions are invalid and the Board should abandon them.

3. The *SolarCity* and *Securitas* Decisions Violate the Federal Arbitration Act.

Finally, the *SolarCity* and *Securitas* decisions are invalid for the additional reason that they violate the Federal Arbitration Act ("FAA").

The FAA provides that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in response to widespread judicial hostility to arbitration,

Congress's intent in passing the FAA was to require courts to "place arbitration agreements on an equal footing with other contracts." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thus, "[r]ules aimed at destroying arbitration" violate the FAA. *Id.* at 343 (considering whether the FAA preempted a state law rule disfavoring arbitration).

Here, as evidenced by *SolarCity* and *Securitas*, the Board has tacitly adopted a policy of invalidating every arbitration agreement that is brought before it. As explained above, there is no justification for *SolarCity* and *Securitas* either under the Board's own precedents or under the Act itself. By refusing to uphold even arbitration agreements that plainly preserve employees' rights to file Board charges, the Board has now made clear that there is no arbitration agreement it would consider to be lawful. *Cf. SolarCity*, 363 NLRB No. 83, slip op at 10 (Member Miscimarra, dissenting) ("My colleagues pursue an analysis that prompts one to wonder whether *any* language would suffice to protect NLRB charge-filing . . . ."); *Securitas*, 363 NLRB No. 182, slip op. at 8 (Member Miscimarra, dissenting) (same).

Moreover, the *Lutheran Heritage* standard applies not just to arbitration agreements but to many types of work rules, and the Board regularly finds non-arbitration-related work rules to be lawful under the *Lutheran Heritage* test. *E.g.*, *William Beaumont Hosp.*, 363 NLRB No. 162, slip op. at 31-32 (ALJ opinion) (in case involving lawfulness of workplace code of conduct, contrasting codes of conduct which the Board found to be lawful from codes of conduct which the Board found to be unlawful). In contrast, Volkswagen is not aware of a *single* decision in which the Board has found an arbitration agreement to be lawful. Thus, there is an explanation for the Board's abandonment of the *Lutheran Heritage* test in *SolarCity* and *Securitas*: hostility to employer-imposed arbitration agreements. But the FAA precludes any policy based solely on hostility to arbitration. *Concepcion*, 563 U.S. at 343.

Of course, the Board never simply strikes down arbitration agreements. Instead, it requires employers either to rescind them or to revise them to "make clear" to employees that they "do not restrict employees' right to file charges with the National Labor Relations Board." *E.g.*, *SolarCity*, 363 NLRB No. 83, slip op. at 6. But, in light of *SolarCity* and *Securitas*, there appears to be no language that an employer could possibly use to comply with the Board's orders. Because the Board will never find that an employer has satisfied its conditions for curing the unlawfulness, an employer's only option is to rescind the agreement. The Board has thus established a *de facto* policy of invalidating every arbitration agreement. As explained above, neither the Act nor the Board's own precedents require this result; rather, the Board's *de facto* policy is motivated solely by its hostility to employer-imposed arbitration agreements. The FAA prohibits such a policy.

Again, Volkswagen stresses that the agreements in *SolarCity* and *Securitas* are distinguishable from the Amended Agreement for the reasons described in Sections IV.B. and IV.C., above. Therefore, there is no need for the Board to reach Volkswagen's argument that those decisions are invalid. However, to the extent the Board disagrees and would not distinguish those decisions, Volkswagen respectfully requests that the Board abandon them for the reasons described in this section.

CONCLUSION

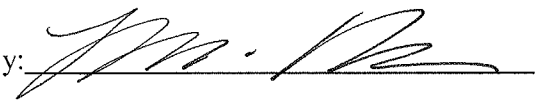
For the foregoing reasons, Volkswagen respectfully requests that the Board rule in its favor and find that neither the Agreement nor the Amended Agreement violate the Act.

In the event that the Board disagrees and finds that the Agreement violated the Act, Volkswagen respectfully requests that the Board find that the Notices effectively repudiated the Agreement.

Finally, in the event that the Board disagrees and finds that the Amended Agreement violates the Act, Volkswagen respectfully requests that the Board specify the exact language that it may add to that agreement in order to bring it into compliance with the Act.

Dated: January 9, 2017

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on **January 9, 2017**, she caused the foregoing document to be served via hand delivery, as well as via email, to the following address:

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